08-30385

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– against –

JUAN PINEDA-MORENO,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
CASE NO. 1:07-CR-30036-PA-1

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION AND ACLU OF OREGON
SUPPORTING DEFENDANT-APPELLANT AND URGING REVERSAL

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STATEMENT PURSUANT TO FRAP 29(C)(5)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than the amici curiae, contributed money that was intended to fund preparing or submitting this brief.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), Amici Curiae the American Civil Liberties Union and ACLU of Oregon (collectively "Amici") state that they are non-profit corporations; that none of Amici has any parent corporations; and that no publicly held company owns any stock in any of Amici.

/s/ Lisa Hill Fenning
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INTEREST OF AMICI

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union Foundation of Oregon, Inc., is the ACLU's Oregon affiliate. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as amicus curiae, including in numerous cases involving the Fourth Amendment. In particular, the ACLU and its members have long been concerned about the impact of new technologies on the constitutional right to privacy. The ACLU filed an amicus brief in *United States v. Jones*, 132 S. Ct. 945 (2012), the decision that prompted the Supreme Court to remand this case for further consideration. It also filed an amicus brief in *In the Matter of the Application of the United States of America for Historical Cell Site Data*, Case No. 11-20884 (5th Cir. appeal docketed Dec. 14, 2011), which addressed the applicability of *Jones* to the related context of cell phone tracking.

ARGUMENT

A. A FOURTH AMENDMENT SEARCH OCCURRED

In *United States v. Jones*, 132 S. Ct. 945, 954 (2012), the Supreme Court held that a Fourth Amendment search occurred when the government placed a GPS tracking device on the defendant's car and monitored his whereabouts nonstop for 28 days. A majority of the Justices also stated that "the use of longer term GPS monitoring . . . impinges on expectations of privacy" in the location data downloaded from that tracker. *Id*. at 955 (Sotomayor, J., concurring); *see also id.* at 964 (Alito, J., concurring). As Justice Alito explained, "[s]ociety's expectation has been that law enforcement agents and others would not – and indeed, in the main, simply could not – secretly monitor and catalog every single movement of an individual's car, for a very long period." *Id.* at 964.

This case is virtually identical to *Jones* except that the search in this case was far longer. Without a warrant, the police attached a GPS tracking device to the underside of defendant's car, enabling them to follow him continuously over a four-month period. As *Jones* held, affixing a GPS monitor and then tracking a defendant's whereabouts for weeks constitutes a "search" within the meaning of the Fourth Amendment. This Court is now faced with the question left open by *Jones*: was the search reasonable despite the lack of a warrant? *Id*. at 954. This Court should hold that it was not.

B. THE WARRANTLESS GPS SURVEILLANCE OF DEFENDANT VIOLATED THE FOURTH AMENDMENT

"Ordinarily, the reasonableness of a search depends on governmental compliance with the Warrant Clause . . . ." *United States v. Kincade*, 379 F.3d 813, 822 (9th Cir. 2004) (en banc). Thus, the Supreme Court has repeatedly reminded that:

> Our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote and internal quotations omitted)). *See also City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) ("warrantless searches are *per se* unreasonable under the Fourth Amendment . . .") (internal quotation omitted); *United States v. Karo*, 468 U.S. 705, 717 (1984) ("Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule."); *Al Haramain Islamic Foundation, Inc. v. United States Dept. of the Treasury*, --- F.3d ----, 2012 WL 603979, at *20 (9th Cir. 2012) ("In most circumstances, searches and seizures conducted without a warrant are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.") (internal citations and

quotations omitted); *United States v. Brunick*, 374 Fed. Appx. 714, 715 (9th Cir. 2010) (same).

The function of the warrant clause is to safeguard the rights of the innocent by preventing the state from conducting searches solely in its discretion:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.

McDonald v. United States, 335 U.S. 451, 455 (1948); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). Illustrative of this principle is *United States v. United States District Court*, 407 U.S. 297, 315 (1972), where the Court upheld the warrant requirement against a claim that national security permitted the state to wiretap phone conversations at its own discretion. The Supreme Court rejected law enforcement's contention that the lawfulness of the search was determined only by its reasonableness: "[t]his view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead

language . . . . It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Id.* at 315 (quotations omitted).[1]

The warrant requirement is especially important here given the extraordinary intrusiveness of modern-day electronic surveillance. Without a warrant requirement, the low cost of GPS tracking and data storage, *Jones*, 132 S. Ct. at 964 (Alito, J., concurring), would permit the police to continuously track every driver. Moreover, if continuous around-the-clock tracking were permissible when a GPS device is attached to a car, it is unclear what principle would bar collection of GPS location data from a variety of other sources, such as GPS tracking of cell phones, computers and tablets with built-in GPS devices.

The exceptions to the warrant clause are few. *See*, *e.g.*, *Gant*, 556 U.S. at 335 (permitting warrantless searches of an automobile incident to arrest "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle"); *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (holding warrantless searches at airports and entrances to courts permissible "[w]here the risk to public safety is substantial and real."); *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that warrantless protective pat-downs of individuals officers encounter in the field are permissible so long as their concerns are justified by reasonable suspicion of

[1] Underscoring the importance of a neutral magistrate's review of the state's application for electronic surveillance, in that case Justice Douglas pointed to evidence that the state's unauthorized wire taps lasted six to 17 times longer than those installed under court order. *Id.* at 325 (Douglas, J., concurring).

possible danger); *Wyo. v. Houghton*, 526 U.S. 295, 300 (1999) (holding that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant where probable cause exists."). This case does not remotely implicate any exceptions. The search was not incident to any arrest, nor did it occur in an "exempt area" such as a border or an airport where special needs make obtaining a warrant impractical. Police had no suspicion of danger, nor could GPS tracking address that suspicion in the manner of a stop-and-frisk.

Elsewhere, the government has suggested that GPS monitoring of a car might be justified under the limited exception for warrantless automobile searches. This is wrong. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge*, 403 U.S. at 461. At issue here is not a search of the inside (or for that matter the exterior) of a car. The continuous monitoring of the defendant for months on end was a far more invasive exercise than a one-time, one-place examination of the contents of a car. What is really important, as Justice Alito observed in *Jones*, is "the use of a GPS for the purpose of long-term tracking," not just the "attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation." *Jones*, 132 S. Ct. at 961 (Alito, J., concurring).

Indeed, the underlying justifications for the automobile exception do not apply to the "24/7" surveillance of a car. Some automobile cases stress that given the extensive regulation of automobiles, car owners have a reduced expectation of privacy. *See, e.g.*, *California v. Carney*, 471 U.S. 386, 392 (1985). But a driver's expectation that his vehicle might be inspected on discrete occasions for various regulatory purposes in no way encompasses an expectation that such momentary intrusions might entitle the state to continuously monitor his whereabouts for months on end. Moreover, the possibility that an automobile might move on before it can be searched, *Carroll v. United States*, 267 U.S. 132, 153 (1925), is entirely misplaced in the case of GPS tracking, where the essential point is that the car should move so that the state can monitor its driver's whereabouts. Of course, if there were a true exigency, the police could attach a GPS tracker absent a warrant under the existing exigent circumstances exception, *Kentucky v. King*, 131 S. Ct. 1849, 1854 (2011), but the kind of long term surveillance here is by its very nature wholly inconsistent with an exigency.

C. THE GPS SEARCH CANNOT BE JUSTIFIED BY ANY *AD HOC* BALANCING TEST

Because the search does not fit any recognized exception to the warrant requirement, the government must urge an entirely new exception to the warrant clause. The government can be expected to argue, as it did in *Jones*, that the Court should apply a "totality of the circumstances" balancing test to uphold its search as

reasonable, notwithstanding the absence of a warrant issued by a neutral magistrate. *See* Brief for United States, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259). The government's proposed test ignores the presumptive invalidity of warrantless searches discussed *supra*. In any event, no balancing tests can rescue the government's position because of the sheer and unprecedented magnitude of intrusion occasioned by the search and the relative ease in obtaining a warrant.

The government's argument in *Jones* that any privacy interest "is minimal," Brief for United States in *Jones* at 49, is wholly inconsistent with the views of the majority of Supreme Court Justices. Justice Alito emphasized the intimate nature of the information that might be collected by the GPS surveillance, including "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." *Jones*, 132 S. Ct. at 955 (quoting *People v. Weaver*, 12 N.Y.3d 433, 442 (N.Y. 2009)). Justice Sotomayor's concurring opinion similarly recognized the potential adverse effects of so intrusive a search:

> Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring–by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion,

> chooses to track–may alter the relationship between citizen and government in a way that is inimical to democratic society.

Jones, 132 S. Ct. at 956 (Sotomayor, J., concurring) (quotations omitted).

At the same time, the warrant requirement imposes no great burden on the state. In *Jones*, Justice Alito observed that the "police may always seek a warrant." 132 S. Ct. at 964 (Alito, J., concurring). In fact, the police obtained a warrant in *Jones*, although they did not adhere to its requirements. *Id.* at 917. Obtaining a warrant to conduct months of GPS tracking is no more burdensome for the state than the warrant required by the Supreme Court to conduct the phone wiretap in *Katz*, and the expectation of privacy attendant to placing calls on a public phone is no greater than the expectation that the state will not, absent a warrant, monitor a citizen's every movement continuously for months on end. Any balancing of the interests at stake here can only confirm the traditional understanding of the Fourth Amendment: that a warrantless search is *per se* unlawful.[2]

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[2] To the extent that the government claims it can avoid the exclusionary rule because its search was conducted in objective reliance on binding precedent, *Davis v. United States*, 131 S. Ct. 2419 (2011), that argument too is erroneous. *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999), which the government has elsewhere argued authorized GPS searches in this Circuit, is inapplicable. Unlike here, the defendant in *McIver* did "not contend that the officers infringed his Fourth Amendment rights by monitoring the beeper as [the car] traveled on the streets and highways." *Id.* at 1126. Moreover, *McIver* turned on the fact that the defendant "concede[d] that the [car] was outside the curtilage," 186 F.3d at 1126. Here, the government concedes that the Defendant's vehicle was inside the curtilage, *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010), and thus the search in this case could not be justified based on *McIver*.

CONCLUSION

The four month warrantless surveillance of Defendant's car violated the Fourth Amendment. The judgment of the District Court should be reversed.

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 08-30385

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Signature of Attorney or Unrepresented Litigant: s/ Lisa H. Fenning

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Date: April 26, 2012

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/s/ Lisa Hill Fenning
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